Queensland Law Reform Commission

Review of Particular Criminal Defences:

Equality and integrity: Reforming criminal defences in Queensland

Consultation Paper February 2025

Submission by Legal Aid Queensland

7 May 2025

Review of Particular Criminal Defences: Consultation Paper

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission to the Queensland Law Reform Commission ('QLRC') addressing the proposals and questions posed in the Consultation Paper Equality and Integrity: Reforming Criminal Defences in Queensland.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. LAQ believes that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

This submission calls upon the experience of LAQ's lawyers in Criminal Law Services, the largest criminal law practice in Queensland, and the Public Defenders Chambers. The combined experiences of these divisions of the organisation in representing disadvantaged people charged with criminal offences informs LAQ that any eradication or diminishment of existing criminal defences ought to be approached with caution; the defences and excuses within the *Criminal Code Act 1899* ('the Code') have been developed and judicially interpreted over many years.

Siloed approaches to the criminal justice system, often overlook the fact that defences such as those under review may operate to protect the most vulnerable and disadvantaged: - the long-term victim-survivor of domestic violence for example, or the disproportionate number of First Nations persons engaged with the criminal justice system. The current statistics for Queensland prisoners are that over a third of all Queensland prisoners are First Nations persons while more than half of all incarcerated women are Indigenous.

It is also easy to lose sight of the fact that, for the provisions under review, in most cases it is the representatives of the *community* that form the jury who determine the issue, and any finding of guilt or otherwise has been made unanimously by a panel of those community representatives. Arguably, the removal or amendment of existing defences creates an irony where on one hand amendments are justified as a product of changing community attitudes, and on the other, it has been the community – through the jury system, that has been making the ultimate determinations of guilt.

There is an inherent difficulty in specifically addressing many of the issues and questions outlined by the QLRC in isolation, particularly those issues reliant upon other, as yet hypothetical reforms. LAQ has reflected this where relevant in the responses set out in these submissions.

Submission

Proposal 1

Repeal sections 271, 272, 273 of the Criminal Code and replace with a provision that provides that a person acts in self-defence if:

a) the person believes that the conduct was necessary –
   i. in self-defence or in defence of another or
   ii. to prevent or terminate the unlawful deprivation of liberty of themselves or another and
b) the conduct is a reasonable response in the circumstances as the person perceives them.

The provision should also provide:

c) Self-defence should only be available as a defence to murder where the person believes their conduct is necessary to defend themselves or another from death or serious injury.
d) Self-defence does not apply if –
   i. the person is responding to lawful conduct and
   ii. the person knew the conduct was lawful.

   However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

Question 1: What are your views on proposal 1?

LAQ supports the proposed simplification of the self-defence provisions as outlined in the consultation paper. Self-defence still has relevancy to ensure that injustices do not occur and to reflect the reality of relationships between, and sometimes extreme behaviour of, human beings. However, it is acknowledged the current provisions, as highlighted in the comparative analysis conducted by the QLRC[1] are overly complex, and there is a rationale for the proposed reforms.

It is desirable that the operation of criminal defences be clear, concise, and readily applicable to the factual matrix that presents. While certainly not impossible to apply, the current complexities with the application of sections 271-273 have led to appeals.[2] Simplification, theoretically, ought to make it easier for the tribunal of fact to apply the law to the facts, for judges to formulate the necessary plain English directions, and reduce the need for appellate intervention.

In LAQ's view, the proposed substituted provision maintains the elements of the various defences within sections 271-273 of the Code, restructured and simplified. In terms of the specific wording of the proposed provisions, there are some shifts in verb tense within the proposal as currently drafted[3], which ought to be resolved to minimise any confusion. Proposal 1 includes the phrase "in the circumstances as the person perceives them". Any final drafting and accompanying explanatory notes must ensure that such phrase does not attract an interpretation that alters the onus of proof, or evidentiary burden on the defendant any more than the current provisions do.

[1] See in particular Queensland Law Reform Commission, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland (*Consultation Paper, February 2025), [98] – [100].
[2] For example, *R v Dayney (No 1)* (2020) 10 QR 638*; R v Dayney (No 2)* (2023) 13 QR 650*; Dayney v The King* [2024] HCA 22.
[3] See, for example within "(a) the person *believes* that the conduct *was* necessary" (emphasis added) at QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), 23.

Question 2: for the purposes of proposal 1:

a) How should 'serious injury' be defined?

For the following reasons, while LAQ supports in principle the proposed simplification of the self-defence provisions, the term 'serious injury' ought to be replaced with 'grievous bodily harm' ('GBH').

The Victorian definition of 'serious injury'[4] is, in effect, a term analogous to 'grievous bodily harm' as the law presently exists in Queensland – albeit the Victorian definition includes an additional discretionary limb to how GBH is presently defined;[5] namely the inclusion of a non-life-threatening injury where it is 'substantial and protracted'.[6]

GBH is defined in section 1 of the Code as:

(a) the loss of a distinct part or an organ of the body;
(b) serious disfigurement; or
(c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available.

In Victoria, the term 'serious injury' is defined as

(a) an injury (including the cumulative effect of more than one injury) that—
    i. endangers life; or
    ii. is substantial and protracted; or
(b) the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm.

However, as it relates to the defence of self-defence for murder in Victoria – which the proposed QLRC amendments mirror - the test is not whether the perception of threat was death or 'serious injury', but rather death or 'really serious injury'.[7] Notably, 'really serious injury' is not defined in the Victorian legislation, other than in s.322H which says that phrase includes serious sexual assault, but is left to the jury to work out what it means.

However, there is some guidance provided by the Victorian benchbook:[8]

Really serious injury

1. For the third element to be satisfied, the accused does not need to have intended that someone die, or known that death would probably result from their actions. It is sufficient if s/he intended to cause someone serious non-fatal harm, or knew that such harm would probably result.
2. In Victoria, the degree of harm that must be intended is "really serious injury".
3. The phrase "really serious" should be used to properly indicate the gravity of the required intent (Wilson v R (1992) 174 CLR 313; R v Perks (1986) 41 SASR 335; R v Schaeffer (2005) 13 VR 337; R v Barrett (2007) 16 VR 240).
4. It appears to be necessary that the "really serious injury" intended or risked should be a bodily injury. This includes unconsciousness (R v Rhodes (1984) 14 A Crim R 124), but may not include purely psychological injuries.
5. The meaning of "really serious injury" is a matter for the jury to determine. It is unwise to elaborate on its meaning. The law gives only very general assistance to juries in this regard. While some injuries are manifestly too slight and some injuries clearly sufficient

[4] *Crimes Act 1958* (Vic) s 15.
[5] *Criminal Code 1899* (Qld) s 1.
[6] *Crimes Act 1958* (Vic) s 15(a)(ii).
[7] *Crimes Act 1958* (Vic) s 322K.
[8] Judicial College of Victoria, The Benchbook: Criminal Charge Book - 7.2.1 Intentional or Reckless Murder (17 April 2025).

to answer the legal test, there remains an infinite variety of situations in which a jury might reasonably take either view (R v Rhodes (1984) 14 A Crim R 124).

6. There is no requirement that the harm intended be a life-threatening harm (R v Cunningham [1982] AC 566.)

An analysis of the Victorian provisions, as they relate to self-defence in a murder case, might be summarised to require:

- subjective belief that the conduct was necessary in self-defence, with that conduct not requiring an intention (unlike the Queensland position) to equate to life-threatening harm, and
- objective reasonableness in the circumstances as perceived by the defendant, and
- subjective belief the conduct was necessary to avoid death to themselves or others, or a really serious bodily injury.

As might then be appreciated, and somewhat obvious from the nomenclature, 'really serious injury' is something more than 'serious injury' in the context of a murder case.

The difficulty however of applying the Victorian terminology of 'serious injury' or 'really serious injury' to Queensland, whether for a murder charge or otherwise, is that it would create inconsistent terminology within the Code where grievous bodily harm is used throughout.

Should the intention of the proposed reforms be that self-defence for murder has a less restrictive approach to what the current Queensland position is, mirroring that of Victoria from which the amendments are inspired, an approach supported by LAQ, that could be made specifically clear in the proposed section(s) rather than importing the Victorian terminology at the risk of creating inconsistency and confusion.

b) Should a non-exhaustive list of factors be included to assist in determining whether the person claiming self-defence has acted reasonably?

LAQ does not support the inclusion of a non-exhaustive list of factors. LAQ is concerned that an inclusion of a non-exhaustive list of factors is counterintuitive, particularly given the proposed reforms aim to simplify the law as it relates to self-defence. Such a list, in LAQ's view, risks the jury wrongly applying such a list of matters in an exhaustive way. It is also inconsistent with the position in other Australian jurisdictions.[9] It might be that the development of a bench book direction could provide some guidance where required as to the relevant considerations which could assist the jury in applying the law to the facts of any individual case.

Proposal 2

The new self-defence provision should provide that evidence that the defendant experienced domestic violence (as defined in section 103CA Evidence Act 1977) is relevant to an assessment of self-defence. It should further provide that the person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:

a) the person is responding to a non-imminent threat of harm or
b) the use of force is in excess of the force involved in the harm or threatened harm.

[9] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [124].

Question 3: What are your views on proposal 2?

LAQ is generally supportive of this proposal; reform in this area is particularly poignant given the disproportionate number of First Nations women who are engaged with the criminal justice system, and who experience the compounding factors arising from the history of colonisation, adverse police interactions, and discriminatory policies.[10] The proposal is in line with the contemporary understandings of concepts such as social entrapment theory,[11] as well as recent legislative reform as to the admissibility of social framework evidence.[12]

LAQ does note, however, that the QLRC's research report 4 detailing an analysis of self-defence and its operation for victim-survivors, is yet to be published.[13] The publication of that data would assist in formulating a meaningful response as to whether such a provision is, in fact, necessary and desirable.

While it is heartening to see that Queensland has the highest proportion of acquittals regarding victim-survivors who kill their abuser, of any Australian jurisdiction, [14] LAQ supports an improved ability for vulnerable defendants to utilise self-defence. But as the QLRC has pointed out from its research, perhaps the biggest barrier for victim-survivors in accessing the defence is the existence of the mandatory sentence, [15] which in LAQ's experience is a significant factor in a victim-survivor's decision to run that defence to trial, or to take a compromised position with respect to manslaughter.

Proposal 3

> The new self-defence provision should provide that self-defence is not available where the person's belief that their actions were necessary and reasonable was substantially affected by self-induced intoxication.

Question 4: What are your views on proposal 3?

LAQ does not support Proposal 3. LAQ considers that self-defence should remain accessible, regardless of whether a person is voluntarily intoxicated, with the fact of their intoxication to be considered by the jury in deciding whether the defendant's conduct was a reasonable response. LAQ also notes that Proposal 1 does not include any element that a defendant *believe* their actions are *reasonable*; rather the proposal provides that 'the conduct is a reasonable response in the circumstances as the person perceives them'.[16]

As the QLRC notes from its research,[17] and as is a similar experience for LAQ's lawyers, it is not uncommon for a defendant who has experienced domestic and family violence (DFV), or

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[10] Queensland Law Reform Commission, *Review of particular criminal defences: Understanding domestic and family violence and its role in criminal defences* (Background paper 3, February 2025), 10.
[11] QLRC, *Review of particular criminal defences: Understanding domestic and family violence and its role in criminal defences* (Background paper 3, February 2025), 24 – 26.
[12] *Evidence Act 1977* (Qld) ss 103CA – 103CD.
[13] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [131].
[14] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [132], citing Dioso-Villa , R. and Nash , C. (2024) "Identifying Evidentiary Checkpoints and Strategies to Support Successful Acquittals for Women who Kill an Abusive Partner During a Violent Confrontation", *International Journal for Crime, Justice and Social Democracy*, 13(4), pp. 44-59.
[15] As outlined in QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [131].
[16] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), Proposal 1.
[17] See QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), 'A bespoke trauma-based partial defence'.

those with backgrounds of abuse and trauma, to abuse drugs or alcohol. The experience of DFV can cause sustained psychological trauma and fear which, in turn, significantly influences a victim-survivor's perception of the threat that they face and what an appropriate response would be.[18] Similarly, people in communities with higher rates of alcohol misuse and violence are more likely to themselves use alcohol or other drugs, including in situations where they then need to defend themselves.

To categorically deny self-defence in such circumstances would, in effect, punish a victim-survivor for responses that could be understandable or objectively reasonable, just because they happen to also be substantially intoxicated.

Many of LAQ's lawyers practice in rural and remote areas in Queensland where alcohol use and abuse often form a prominent characteristic of criminal offending. Removing access to self-defence in circumstances of self-induced intoxication is more likely to disproportionately impact the most vulnerable of people; particularly victim-survivors of DFV, and those in communities with high rates of alcohol abuse and violence, including First Nations people.

LAQ supports a flexible approach which would see the defence still left to a jury to apply within the individual circumstances of each case, even if the defendant was substantially intoxicated. A flexible approach is ultimately a more just approach in allowing a consideration of a diversity of circumstances. LAQ suggests that a defendant's self-induced intoxication be considered in determining whether the defendant's response is reasonable, in that the defendant's conduct will not be reasonable if it would not have been reasonable for a non-intoxicated person to engage in the same conduct.

Question 5: In light of proposals 1 and 2 (about self-defence), should the defence of compulsion in section 31(1)(c) of the Criminal Code be repealed?

LAQ does not support the repeal of s 31(1)(c) without the opportunity to consider a detailed proposal of amendments to s 31(1)(d) and s 31(2), and draft self-defence provisions. While the relevance of s 31(1)(c) may diminish for offences of violence if self-defence is amended in accordance with the proposal, it is not apparent at this stage that a need for s 31(1)(c) is entirely absent, particularly as a defence to non-violent offences.

For example, s 31(1)(c) has an appropriate role if a person is threatened with violence to themselves or another person if they do not commit a particular property or drug offence. The new proposed self-defence provision under proposal 1 requires that the defendant believe their conduct was necessary in 'self-defence or in defence of another' - it is not clear that the ordinary meaning of those words would cover the conduct involved in a property or drug offence to avoid the commission of violence to a person. Separately, section 31(1)(d), unlike s 31(1)(c) only applies to threats of 'serious harm or detriment', which may not include threats of common assault or assault occasioning bodily harm. For example, if a defendant is threatened to be punched in the face or the abdomen if they do not hold another person's personal quantity of cannabis, neither the new self-defence provision, nor s 31(1)(d), would appear to provide a defence to that defendant when they ought properly have a defence. Section 31(1)(c) does provide a defence.

[18] The report notes that potential longer-term impacts of potentially traumatic experiences may include the development of mental health conditions including acute stress disorder, posttraumatic stress disorder, depression, anxiety or alcohol and other drug misuse, or other chronic psychological and social factors. Those can impair the day to day functioning, capacity to carry our normal roles, or interfere with relationships: Queensland Mental Health Commission, Consultation paper: Development of a whole-of-government Trauma Strategy for Queensland - , The prevalence and impacts of trauma in adults (Consultation Paper, December (2024) p3: Phoenix Australia - QMHC paper prevalence and impact of trauma in adults_FINAL_070524.pdf

LAQ looks forward to providing further feedback in relation to s 31(1)(c) once more detailed proposals for self-defence and, in particular, s 31(1)(d) and s 31(2), are released.

Question 6: In light of proposals 1 and 2 (about self-defence), are changes to the defence of duress in section 31(1)(d), and the exclusions in section 31(2), of the Criminal Code required?

Regarding s 31(1)(d) itself, LAQ acknowledges the issue that the QLRC identifies for victim-survivors and the requirement placed upon them by *Taiapa* that they 'must have a reasonable basis for believing that the law and its enforcement agencies cannot afford protection from the threat'.[19]

Victim-survivors may not trust the police or believe that seeking their help will make them safer because they may have faced police inaction in the past. More broadly, the commandment 'go to the police' does not reflect the reality of social entrapment and coercive control. As such, LAQ considers that duress may need to be amended to address this issue, potentially by clarifying the variety of circumstances why a person might 'reasonably believe' they cannot otherwise escape the carrying out of the threat.

LAQ does support the removal of the exclusions in s 31(2) of the Code, particularly the murder and GBH exclusions.

Duress ought to apply to offences for which causing GBH, or intending to cause GBH, is an element. LAQ considers the current exclusion has no real merit; if a person is in circumstances that meet the fairly stringent conditions of duress, they ought to be excused from criminal liability for causing, or intending to cause, GBH. There are only two other jurisdictions in Australia that exclude causing injuries similar to GBH from the offence of duress.[20]

Duress ought also to be available in cases of murder. For example, Person A holds a gun to Person B's child and says that they are going to kill the child unless Person B kills someone else, Person C. At present, if Person B then killed Person C, they would be guilty of murder. The law is therefore effectively requiring a person to value the life of a stranger over the life of their own child. Section 31(2) therefore expects too much of the ordinary person. Removing murder from s 31(2) does not justify murder in such a situation, but consistent with the standard human experience, excuses the defendant from severe criminal responsibility if the jury considers their actions were reasonably proportionate.[21] LAQ notes several other Australian jurisdictions permit the application of duress to offences of murder.[22]

Expanding duress in this way does not have the effect of countenancing murder. There remains the requirement of reasonable proportionality, and there are a very limited number of cases in which the elements of duress would be established, particularly given the requirement that murder be reasonably proportionate to the threat.

LAQ welcomes the opportunity to provide further feedback to any future detailed proposals to reform s 31 of the Code.

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[19] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), 35.

[20] *Criminal Code 1983 (*NT) s 40(2), and *Criminal Code 1924* (Tas) s 20.

[21] See, similarly, UK Law Commission, *Murder, Manslaughter and Infanticide* (2006) at [6.43]; *Hasan* [2005] 2 AC 467 at [21] (Lord Bingham).

[22] Namely, *Criminal Code* (Cth) s 10.2; *Crimes Act 1958* (Vic) s 322O; *Criminal Code* (WA) s 32; *Criminal Code* (ACT) s 40.

Proposal 4

The partial defence of killing for preservation in an abusive domestic relationship in section 304B of the Criminal Code should be repealed.

Question 7: What are your views on proposal 4?

While LAQ welcomes the reformulation and expansion of self-defence, LAQ considers it premature to consider repeal of s 304B of the *Criminal Code* (Qld) on the basis only of the introduction of a wider self-defence provision.

There is an important role for a partial defence to murder for those who kill in response to a history of serious abuse by another person. The defence properly mitigates culpability when a person kills their long-term abuser. While Queensland continues to have a mandatory sentence of life imprisonment for murder, or enacts a presumptive sentence of life imprisonment, the partial defence plays an important role to permit a sentence that is proportionate to a defendant's moral and criminal culpability, including for vulnerable female defendants.

In the context of a mandatory penalty of life imprisonment, if the defence is in fact encouraging those who are abused and have a genuine claim of self-defence to proceed to trial,[23] it serves a distinct and important role separate to an expanded self-defence provision. That is so, whether the defence is left to the jury with or without another defence, such as in the case of *R v Cooktown*,[24] or the defence is used in negotiating the resolution of proceedings, such as in *R v Sweeney*.[25]

LAQ notes that s 304B may in fact operate better if it can apply to a wider set of cases beyond those where the defendant believes their act is necessary to preserve themself from something as grave as death or GBH.[26]

Ultimately, LAQ considers it is preferable to review the operation of s 304B once there has been time to observe how any proposed new self-defence provision and other new partial defences are operating. If section 304B is nonetheless repealed at this stage, LAQ supports the introduction of a trauma-based partial defence in addition to a partial defence of excessive self-defence.

Proposal 5

The partial defence of killing on provocation in section 304 of the Criminal Code should be repealed.

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[23] The latter is the suggestion at QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [185].

[24] *R v Michelle Cooktown* (Supreme Court of Queensland, Henry J, 25 February 2020). There was a relationship of a few months in which both the deceased and defendant were violent towards each other. Four days prior to killing the deceased made unwanted sexual advances and penetrated the defendant with a bottle. On the day of the killing, the deceased insulted the defendant and threatened to 'grog fuck' her again, and the defendant stabbed him four times. Henry J found the jury returned a verdict of not guilty on murder because of either s 304B or s 304 of the Code.

[25] *R v Samantha Sweeney* (Supreme Court of Queensland, Henry J, 3 March 2015). See also, as a case of manslaughter that might have fallen under at least s 304B, *R v Blockey* [2021] QCA 77.

[26] That is, to the circumstances original proposed in the Bond Report: see The latter is the suggestion at QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [173], referencing Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (Report, July 2009) 10 [1.29], 11 [1.32].

Question 8: What are your views on proposal 5?

LAQ opposes abolishing the defence of provocation under s 304 of the Code.

There are in fact proper and meritorious cases where the defence is raised successfully, in line with community standards, to reduce moral and criminal culpability.[27] It is appropriate that the defence apply:

- Where a defendant, who has been abused by another person on one or more previous occasions, acts in a state of rage and kills their abuser shortly after a further act of abuse, even if the defendant does not consider the most recent act of abuse is such that it is necessary for them to defend themself from death or serious injury. Such a defendant ought not face a mandatory sentence of life imprisonment. It is noted defendants in this situation may often be women or other marginalised persons.
- Where a defendant child, or young adult, has impaired impulse and emotional control, whether partially because of the effect of their prejudicial upbringing (including neglect or abuse), because of their age having regard to general development of a human brain, or impacted by an organic cognitive impairment. When provoked or insulted in a significant away, and potentially on a background of trauma or abuse, killing in circumstances of provocation properly recognises that their moral culpability is lowered.

LAQ has deep concern for the outcome of future defendants in similar positions if the defence is repealed. Provocation is not a full defence to murder, and therefore does not reward such behaviour. Successful reliance on provocation still results in a conviction for manslaughter and a significant term of imprisonment. LAQ especially opposes abolishing the defence of provocation under s 304 if the sentence for murder remains mandatory life imprisonment or becomes a presumptive sentence of life imprisonment.

The results of one case should not provide a reason to remove a defence that has an important role to play. Further, neither the fact the defence may be complex,[28] nor the fact there is some difference between s 304 and s 268, provide adequate reason to abolish the defence in circumstances where it has an appropriate role to play. Rather, careful consideration of amendments to address that complexity, and differences in approach, is more appropriate. The terminology used in s 304(1) can be meaningfully modified and modernised.

The repealing of this partial defence is particularly concerning in circumstances where any child convicted of murder faces the mandatory penalty of life imprisonment[29]. Many children have issues with control of their emotions and impulses, particularly those from disadvantaged communities. LAQ considers that in instances where a child or young person kills in anger against a background of childhood deprivation that did not include ongoing domestic and family violence or physical abuse, neither proposed trauma partial self-defence nor excessive self-defence may apply. As a result of the repeal of s 304, the child would be left without a partial defence, and would have to be sentenced to life imprisonment. In LAQ's experience, the availability of this partial defence leads to just outcomes, for example, vulnerable victim-survivors who kill their abusers. In those cases, defendants are still held criminally responsible for wrongdoing, but are able to be sentenced in accordance with their moral culpability. Human

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[27] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [206], referring to the matter of *R v Roxanne Peters* (Supreme Court of Queensland, Boddice J, 29 October 2018), where the defendant had earlier been raped and humiliated by the deceased, with whom there was no domestic relationship, and who had threatened to harm her child if she did not comply with further demands for sex.

[28] Cf QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [204].

[29] *Youth Justice Act 1992* (Qld) s 175A.

behaviours and reactions do not occur in a vacuum. The jarring outcomes of a small minority of cases (cases determined by juries) should not be used to justify removal of an avenue that could provide just outcomes in many other cases.

Question 9: Should the Criminal Code be amended to add a new trauma-based partial defence to murder that applies when a victim-survivor of domestic violence kills their abuser? How should this be framed?

LAQ is supportive, in principle, of introducing a new trauma-based partial defence to murder. Such a new partial defence would be more appropriate if s 304 and/or s 304B of the Code are repealed.

LAQ submits that such a defence should not be restricted to those who are victims of domestic and family violence. It should also be available to those who are victims of prolonged serious abuse, including but not limited to sexual abuse, by another person.

For example, a child who is regularly sexually or physically abused by their neighbour or a teacher, or a disabled person who is regularly abused by a carer. Those persons are in equally vulnerable circumstances and equally deserving of a partial defence. LAQ suggests QLRC consider drafting any such partial defence to apply to defendants who are victim-survivors of either domestic abuse or persistent abuse, and who kill their abuser. Extending the defence beyond cases of domestic and family violence is particularly important if the defence of provocation is abolished; otherwise, persons in the examples given earlier in this paragraph would be sentenced to the same penalty as the defendant who commits a pre-meditated murder for reward.

Question 10: Should the Criminal Code be amended to add a new partial defence to murder that applies where the defendant has acted excessively in self-defence and, if so, should the defence apply:

(a) only in the context of DFV where the person in most need of protection kills their abuser or
(b) generally?

LAQ supports introducing excessive self-defence as a partial defence to murder. The defence should not apply only to victims of DFV, but should apply generally.

First, for the same reasons outlined in response to Questions 9, this defence should be open to those who experience trauma or abuse outside the context of DFV. Second, and more fundamentally, any person who genuinely believes their conduct was necessary in self-defence or defence of another, but then acted excessively and caused death, is in a categorically different position to a person who intended to kill or cause GBH without such belief of necessity of defence.

The goals of sentencing do not demand the same penalty for those acting in excessive self-defence as those who did not consider they needed to protect themself. Consistency in application of sentencing principles is achieved by treating different cases differently;[30] cases of excessive self-defence, ought as a matter of consistency in sentencing, be recognised as manslaughter and sentenced accordingly.

[30] *Hili v The Queen* (2010) 242 CLR 520 at [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Question 11: Should the mandatory life sentence for murder be:

a) Retained for all murders
b) Retained but only for particular cases
c) Replaced with a presumptive life sentence; or
d) Replaced with a maximum life sentence?

LAQ opposes retaining the current mandatory sentence of life imprisonment, and strongly supports replacing the mandatory sentence with a maximum penalty of life imprisonment (option (d)). There are several reasons for this.

First, a maximum penalty of life imprisonment would more appropriately reflect the circumstances of individual cases, particularly as the definition of murder has become wider over time. In 2019, s 302(1)(aa) of the Code was inserted to add reckless indifference murder, which creates liability for murder where the accused is aware death is the probable result of their conduct. There are likely to be many cases where a person has caused the death of another without intent to kill or cause GBH where the appropriate penalty would be a lengthy term of imprisonment that is less than life imprisonment. Intending to kill another person, with pre-meditation, in many circumstances could be considered markedly more serious, and in greater need of punishment, denunciation and deterrence, than recklessly causing the death of another. Further, on an objective view, being held criminally responsible as a party by virtue of sections 7 and 8, or the application of the felony murder aspect of section 302(1)(b) has from time to time led to technical convictions for murder but unjust outcomes.[31]

Second, a maximum penalty of life imprisonment is better at promoting consistency in sentencing within Queensland than the current mandatory sentence. LAQ disagrees with the suggestion that the current mandatory penalty promotes consistency. As the High Court stated in *Hili v The Queen*, reasonable consistency in sentencing seeks the treatment of like cases alike and different cases differently.[32] A discretionary head sentence permits a sentencing court to treat different cases differently. Among a variety of relevant mitigating features, a defendant's profoundly deprived upbringing and mitigating psychiatric diagnoses can properly be taken into account if sentencing is discretionary. One example where the sentencing judge said he could not take into account the defendant's very young age, or disadvantages experienced growing up in a remote community was *R v Ngakyunkwokka*:[33]

> *"I cannot take account of your age. You were only 18 at the time of this offence. You are now only 20. I cannot take into account the disadvantages that you may have experienced as a child and as a teenager.*
>
> *We heard in this Court the difficulty that citizens face in Aurukun. This is not the time or the place to give a history lecture. But the story of Aurukun was told by witnesses in this Court in 1981: see R v Alwyn Peter [1981] QSC 398. The problems of Aurukun stem from dispossession of people who lived at Mapoon.*
>
> *We have heard in this trial about the difficulties that are faced by police in policing a community where there is too much fighting. It would be a terrible thing if anyone thought that there was no hope for Aurukun. It would be a terrible thing if people thought that most people in Aurukun are violent and fighters. We know that there are community leaders and good people in Aurukun who hate violence. This Court cannot solve all of those problems. My job is not to do so."*

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[31] See, for example, *R v Witsen* [2008] QCA 316; *R v Clarke* [2015] QCA 71; *R v Huston* [2017] QCA 121; and *R v Thrupp; R v Taiao; R v Walker; R v Daniels* [2024] QCA 134.
[32] *Hili v The Queen* (2010) 242 CLR 520 at [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[33] *R v Kyle Ngakyunkwokka* (Supreme Court of Queensland, Applegarth J, 6 October 2021), 2.

Third, the ability to achieve a penalty less than life imprisonment will enable real discounts for early pleas of guilty, likely causing a significantly greater number of pleas of guilty to murder and reduction in the number of murder trials. LAQ's experience is that the mandatory sentence of life imprisonment, along with a lengthy non-parole period, is a matter that appears to influence advice from lawyers to clients and the decision of some defendants to proceed to trial. A discretionary penalty will result in significant cost-savings to the justice system and achieve quicker resolutions for victims' families and friends.

Fourth, Queensland's approach is harsher and more inflexible than the three Australian jurisdictions that have either mandatory life imprisonment or presumptive life imprisonment. Those three states are South Australia and the Northern Territory (NT) (both mandatory life) and Western Australia (WA) (presumptive life).[34] Queensland defines murder to include a much wider set of circumstances than in the NT or WA. In the both the NT and WA, murder does not include reckless indifference murder, and in the NT, murder also does not include constructive murder.[35] South Australia includes both reckless indifference murder and constructive murder, but the latter is narrower than in Queensland, in that it is restricted to where the defendant commits an intentional act of violence in further of a major indictable offence punishable by at least 10 years imprisonment.[36] By contrast, in Queensland, the 'unlawful purpose' spoken of in s 302(1)(b) does not need to be an offence punishable by at least 10 years imprisonment. Queensland therefore defines murder more widely than each of South Australia, the NT and WA. Ultimately, given how widely Queensland now defines murder, other states that retain a mandatory or near-mandatory penalty of life imprisonment do not provide any support to the status quo in Queensland - none go as far as saying only life imprisonment is appropriate for everything now included in s 302(1) of the Code.

Fifth, such a change would be consistent with most other jurisdictions that include reckless indifference murder as a type of murder, namely, NSW, Victoria, Tasmania, and the ACT. In each jurisdiction, the maximum penalty is life imprisonment. That properly recognises that recklessly causing the death of another can be relatively, and significantly, less serious, and less culpable than other types of murder.

If option (d) is not approved, LAQ considers that, of the remaining options, then a version of option (b) that differentiates sentences on the basis of the defendant's mental element is perhaps preferable. LAQ considers that mandatory life imprisonment should then be reserved only for cases where the defendant intended to kill the victim, and should certainly exclude cases relying on either s 302(1)(aa) or (b). As part of such proposed reform, it must be stipulated that if there is a dispute about whether the defendant intended to kill, the Crown needs to prove such intention beyond reasonable doubt. If this option were to be progressed, LAQ welcomes the opportunity to provide further feedback.

The approach of reserving mandatory life imprisonment for certain victim types is problematic, including for the reasons identified by the QLRC.[37] That approach is not supported by LAQ.

LAQ does not support a presumptive life sentence (option (c)) where the legislative provision provides that a sentence other than life imprisonment can only be imposed in exceptional or similar circumstances. Such a test does not properly account for the broad definition of murder in Queensland and is far too inflexible. While this would be a small improvement from the current mandatory life sentence, it is subject to the same problems as the current mandatory

[34] *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Code Act 1983* (NT) s 157; *Criminal Code Compilation Act 1913* (WA) s 282.
[35] *Criminal Code Act 1983* (NT) s 156; *Criminal Code Compilation Act 1913* (WA) ss 278, 278; *Criminal Code 1899* (Qld) s 302.
[36] *Criminal Law Consolidation Act 1935 (SA)* s 12A
[37] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [260], re Option (b).

life sentence, particularly if the test is applied as stringently as it is in WA. A presumptive life sentence that permits a different sentence to be imposed if the 'interests of justice' require a different sentence would be more appropriate.

The current mandatory penalty is unfair, causative of inconsistencies and delays, and unjustifiably costly to the Queensland justice system. LAQ strongly supports careful reform to the current mandatory head sentence.

Question 13: Do you have a preferred approach when combining reforms to the head sentence and non-parole period?

LAQ agrees with the characterisation of the QLRC that Queensland's sentence regime for murder is the most restrictive.[38] It is also the harshest, before even considering how it applies to children.

For the reasons given in LAQ's response to questions 11 and 12, LAQ strongly prefers 'Combination 3' - a maximum period of life imprisonment, with a completely discretionary approach to non-parole periods (or the non-parole period default to the existing rules under the SVO scheme). LAQ notes that amendments would be required to the SVO legislation for the inclusion of murder in the scheduled offences[39].

LAQ wishes to emphasise the importance, to disadvantaged and First Nations communities, of reform to the head sentence for murder. For those convicted of murder, the Parole Board may release a person on parole on conditions they not return to the remote community they lived and grew up in if that is where the murder occurred. This sees a defendant then living without stable housing in larger regional centres, such as Cairns or Mount Isa. This exposes those persons to greater policing and the criminal justice system for minor offences such as committing a public nuisance or possessing a small amount of cannabis, and thus raises the possibility of further sentences of imprisonment and/or suspension of their parole. Reforms that only affect the non-parole period for the offence of murder are likely to still significantly disadvantage low-income and First Nations people, as their exposure to these circumstances remains for life.

LAQ also considers that it is imperative the QLRC has regard to the fact that the current mandatory sentencing regime for murder also applies to children.[40] Life sentences operate even more harshly on young people, noting the longer period of life in front of them. Given the sentencing regime is now replicated for children in Queensland, the downsides of a mandatory sentence of life imprisonment and 20-year non-parole period are even greater.

Proposal 6

The defence of provocation in section 269 of the Criminal Code should be amended so that the defence does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

Question 14: What are your views on proposal 6?

LAQ does not support the proposed amendment to section 269.

[38] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [283].
[39] *Penalties and Sentences Act 1992* (Qld) Part 9A and Schedule 1.
[40] *Youth Justice Act 1992* (Qld) s 175A.

LAQ is concerned that removing the defence of provocation in section 269, for domestic violence offences, would have the potential of exposing primary victims of domestic and family violence to criminal liability and leaving them without recourse to an appropriate defence.

The term "domestic violence offence" is defined in section 1 of the *Criminal Code* as meaning:-

> "an offence against an Act, other than the Domestic and Family Violence Protection Act 2012[41], committed by a person where the act done, or omission made, which constitutes the offence is also-
>
> a) domestic violence or associated domestic violence, under the Domestic and Family Violence Protection Act 2012, committed by the person; or
> b) a contravention of the Domestic and Family Violence Protection Act 2012, section 177(2)".

There is a suggestion that community attitudes have changed and use of the provocation to assault defence in a particular Domestic and Family Violence (DFV) scenario was not met with favour in the QLRC's community attitudes survey.[42] It is noted that the survey posed three scenarios which involved potential provocation to an assault, one of which was a DFV scenario where a man harms his female partner after a dispute.[43] None of the scenarios in the survey involved an abused defendant who engages in retaliatory violence against a primary aggressor.

In 2020, the Australian Institute of Criminology published the results of a study of 153 police narratives of domestic violence incidents involving a female person of interest. Amongst key findings, were that "half of the incidents involved either self-defensive or retaliatory violence", and that "violent resistance was more common in incidents involving Indigenous women".[44]

It is noted that a domestic violence offence, as defined in section 1(a) of the Criminal Code, is not restricted to an offence committed by a respondent to a domestic violence order, for example.

If the conduct of the person assaulted is sufficiently provocative so as to cause an accused to be deprived of the power of self-control, so as to cause that person to assault the other person, that accused person should not be deprived of the right to seek to raise a defence of provocation, simply because the two parties are in a "relevant relationship" as defined by the *Domestic and Family Violence Protection Act 2012*.[45]

Consider the following scenario: - A woman has been in a longstanding domestic and family violence relationship. Throughout that relationship, she has been subject to verbal taunts, abuse, and ridicule from her partner. One night, after enduring a barrage of such abuse and taunts, she finally reacts by assaulting her partner, striking him in the face and causing a fractured nose. The neighbours (who have no idea what actually happened and have no idea of the history of domestic and family violence endured by the woman) call the police, because they hear yelling and screaming coming from the house. The man tells the police that the woman

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[41] *Domestic and Family Violence Protection Act 2012* (Qld) s 8.
[42] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [291] & [300], referencing Queensland Law Reform Commission, *Review of particular criminal defences: Community attitudes to defences and sentences in cases of homicide and assault in Queensland* (Research report 1, November 2024), key findings 3 and 8.
[43] QLRC, *Review of particular criminal defences: Community attitudes to defences and sentences in cases of homicide and assault in Queensland* (Research report 1, November 2024), 34.
[44] Boxall H, Dowling C & Morgan A 2020. Female perpetrated domestic violence: Prevalence of self-defensive and retaliatory violence. *Trends & issues in crime and criminal justice* no. 584. Canberra: Australian Institute of Criminology. https://doi.org/10.52922/ti04176
[45] *Domestic and Family Violence Protection Act 2012* (Qld) s 13.

was hysterical and assaulted him. He wants her charged. The woman admits to police to assaulting him but says that she simply snapped after years of being belittled.

The proposed amendment would deprive the woman in this scenario of access to a defence under section 269. This approach is inconsistent with an understanding of how DFV victimisation contributes to offending.

Of great concern is the impact this would have Aboriginal and/or Torres Strait Islander DFV victim-survivors. There is Queensland research which reveals the increasing incarceration of Aboriginal and/or Torres Strait Islander women who are both victimised and criminalised, in the context of DVO contraventions, citing the tendency that they are more likely to use violence to protect themselves.[46]

LAQ's concern is that an amendment will operate unfairly to disadvantage DFV victim survivors and to further criminalise Aboriginal and/or Torres Strait Islander women, leading to further increases in incarceration.

For these reasons, LAQ is of the view that this defence remains fit for purpose and should be retained.

Proposal 7

The defence of prevention of repetition of insult in section 270 of the Criminal Code should be amended so that the defence only applies to offences of which assault is an element and does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

Question 15: What are your views on proposal 7?

LAQ does not support restriction of this defence in the terms proposed.

Under section 270 of the Code, "*It is lawful for any person to use such force as is reasonably necessary to prevent the repetition of an act or insult of such nature as to be provocation to the person for an assault, if the force used is not intended, and is not such as it likely, to cause death or grievous bodily harm"*.

In *R v. Sleep* [1966] Qd R 47, Hart J ruled that, defences under section 269 and section 270 of the *Queensland Criminal Code,* were available to an accused charged with manslaughter and not limited to offences of which an assault is an element.

It has since been held that the defence of provocation is not available to a person charged with manslaughter[47] It remains the law in Queensland however, that the defence under section 270 is not limited to offences of which an assault is an element.

This defence contains limitations which restrict its application when considered by the arbiter of fact. The prosecution bears the onus of disproving the defence, once raised, beyond reasonable doubt. Therefore, the defence will be negatived if the prosecution can satisfy a court that: -

(a) The force used by the accused was not reasonably necessary (i.e. that, rather than being reasonably necessary to prevent the repetition of the act or insult, the force used was not reasonably necessary, or that it was excessive or disproportionate); or

[46] Douglas H & Fitzgerald R 2018. The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people. International Journal for Crime, Justice and Social Democracy 7(3): 41–5

[47] *Kaporonovski v. The Queen* (1973) 133 CLR 209

(b) The act or insult was not of such a nature as to be provocation to the person for an assault; or
(c) The force used was intended, or was likely, to cause death or grievous bodily harm (even if death or grievous bodily harm did not necessarily occur).

Grave actions such as choking (grabbing a complainant around the neck, such as to prevent or restrict breathing), if relied upon to prevent repetition of insult, would seemingly be inconsistent with the defence. A jury would be likely to consider that such force was not reasonably necessary. Further, the act of choking would also be regarded as force which would be likely to cause death or grievous bodily harm.

On the other hand, a person who applies force to another person in order to prevent repetition of a sufficiently provocative act or insult (by, say, a push or a punch), should arguably be entitled to raise the defence, even if death or grievous bodily harm results, so long as such death or grievous bodily harm was neither likely nor intended. This scenario could occur in cases where a DFV victim survivor accused has used retaliatory violence against their primary aggressor.

If the defence were restricted to offences which contain assault as an element, this could unfairly exclude a DFV victim survivor accused who is charged with a wounding offence for example. The Australian Institute of Criminology study referred to in the response to question 14, found that female offenders in this context are *"more likely to use weapons, but less likely to strangle, punch or kick their victims (Archer 2002; Melton & Belknap 2003), meaning injury is more likely to occur in the context of weapon use (Archer 2000; Caldwell, Swan & Woodbrown 2012; Felson 1996; Felson & Cares 2005)".*[48]

Further, there is public interest in preserving the availability of a section 270 defence for domestic violence offences, for those who offend as DFV victim survivors. Removing the applicability of the defence to domestic violence offences, could have the unintended consequence of denying the defence to the person who is the one most in need of protection in a relevant relationship.

This would also serve to further criminalise Aboriginal and/or Torres Strait Islander victim-survivors who offend in this context, as noted in the response to question 14.

Question 16: What reforms are needed to criminal law practice and procedure to improve access to appropriate defences by DFV victim-survivors who offend?

This response addresses each of the five potential reforms set out in the consultation paper.[49]

Introduce special protections for DFV victim-survivors during police interviews

LAQ supports specific protections for this vulnerable cohort during police interviews, to ensure a fairer process from an early stage and better outcomes for clients.

In particular, access to legal advice at this early stage may result in a DFV victim survivor exercising their right to silence. In many cases, this will be a sound decision, given the potential

[48] [48] Boxall H, Dowling C & Morgan A 2020. Female perpetrated domestic violence: Prevalence of self-defensive and retaliatory violence. *Trends & issues in crime and criminal justice* no. 584. Canberra: Australian Institute of Criminology, page 2 https://doi.org/10.52922/ti04176

[49] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [313] – [334].

risks of taking part in a police interview. This is especially in the aftermath of a traumatic event, without access to legal advice and if language and cultural barriers exist.

The decision whether or not to take part in a police interview could impact in a way that deprives themselves of full access to an appropriate defence, which might otherwise be preserved for them at trial. Examples are the partial defences to murder, of killing for preservation in a domestic relationship or provocation, the latter which requires an accused to discharge the burden of proof.[50]

An accused impacted by their exposure to a DFV primary aggressor is particularly vulnerable and may struggle to advocate for themselves. They may not appreciate the role of a police officer in the proceedings, who will ask questions with a view to establishing the elements of offences, and to negative a defence, sometimes stopping short of a question which might provide more context and support for a defence. Police conducting interviews in homicide cases are often senior and experienced in interrogations.

In LAQ's experience, many in this cohort also have a pre-existing distrust of policing figures. In smaller communities there can be fear of retribution (to themselves and their children), economic disadvantage, shame and a corresponding reluctance or unwillingness to cast their primary aggressor in a bad light. Language barriers are also a significant issue.

The consultation paper notes the tendency of female accused in this cohort to readily accept responsibility for conduct and absolve the primary aggressor or minimise blame for their aggressor's behaviour.[51] The framework of "social entrapment theory" which guided the Taskforce in its examination of coercive control, and consideration of the social context is highly relevant for police to consider at the early stage of an investigation.[52] There is potential for this cohort to make statements which are easily misconstrued because of the complexities of their relationship history and as a result of complex trauma. For example, there could be a tendency to leave out relevant background to the relationship, to avoid telling a person in authority the full facts or to downplay the situation. This can result in an inaccurate understanding of the true nature of the relationship. It may result in the omission of any relevant detail to support an explanation for the alleged conduct of the DFV victim-survivor. Cultural norms can further contribute to factual misrepresentations.

The power imbalance in the relationship between interviewing police and a female accused in this cohort, is highly significant when examining this issue. As noted in an *Australian National Research Organisation for Women's Safety's research report* published in 2020:

> "*Women's and professionals' accounts indicated that police play a vital gatekeeping role in women's safety and access to justice. Women observed that they had to make the right impression on police if an investigation was to proceed, or if women were to receive a proactive or protective response from police. However, women with experiences of complex trauma frequently interacted with police during periods of*

[50] *Criminal Code 1899 (Qld)* s 304(9).
[51] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [319].
[52] QLRC, *Review of particular criminal defences: Understanding domestic and family violence and its role in criminal defences* (Background paper 3, February 2025), 24.

> *crisis, and their traumatised presentations rendered the women vulnerable to a range of pejorative assessments and judgements by police officers*."[53]

LAQ supports investment in continued training of police officers who undertake interviews in these contexts. Training should embed an understanding of trauma-informed interview techniques, to uncover an accurate version and relevant background, and avoid the limitations of a traditional incident-focussed approach.

LAQ notes that this is particularly important in the context of interviews with a DFV victim survivor from a culturally diverse community and from within an Aboriginal and/or Torres Strait Islander community. Training should include cultural competency modules, so that cultural norms and environments are properly considered in informing a best practice approach.

If the provisions in the *Police Powers and Responsibilities Act 2000*[54] for the questioning of particular persons, are amended to insert protections to cover this cohort of vulnerable people, this will need careful implementation and resourcing to be effective.

The provision could mirror that for the questioning of Aboriginal and/or Torres Strait Islander peoples.[55]

LAQ notes that some of the most vulnerable and disadvantaged clients often live in the most regional and remote areas. Access to an appropriate support person can be challenging in remote areas where there are reduced options for legal and social services to choose from.

There are risks that the "support person" requested by the person is someone who is enmeshed with the DFV dynamic or who may perpetuate cultural norms which restrict the taking of an accurate account. This may be particularly challenging in a regional area where confidentiality in a community is more difficult to maintain.

It can also be very difficult to find an appropriately qualified interpreter for clients, particularly in remote areas, including those who speak First Nations languages. There is a risk that a support person may "double-up" as interpreter and this may limit the options that an accused has to choose a person they trust.

Consideration could be given to a police requirement to notify a DFV organisation or to offer access to contact one. This would have significant resource implications for a relevant organisation and would necessitate funding to properly service this initiative. This is particularly the case if such questioning occurs outside of usual business hours or by way of remote technology to a regional or remote area. As identified above, such legislative requirement would also need resourcing both in training of police and ensuring the relevant organisations have capacity to provide the support.

LAQ recommends extensive consultation with relevant DVF stakeholders be undertaken in further consideration of this proposal.

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[53] Salter, M., Conroy, E., Dragiewicz, M., Burke, J., Ussher, J., Middleton, W., Vilenica, S., Martin Monzon, B., & Noack-Lundberg, K. (2020). "A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence (Research Report, 12/2020). Sydney: ANROWS at page 99

[54] *Police Powers and Responsibilities Act 2000* (Qld) Chapter 15, part 3, Div 3

[55] *Police Powers and Responsibilities Act 2000* (Qld) s 420.

Expressly recognise DFV Victim-survivors who offend and Aboriginal and Torres Strait Islander peoples as special witnesses

In our experience it is more frequent than not, that an accused at a jury trial will exercise a right to silence. There will be cases though where it may be in the best interests of an accused person, to give evidence at their trial. These scenarios include if they are relying on a defence of self-defence, or a partial defence of killing for preservation in a domestic relationship or provocation. An accused who elects to give evidence should be afforded the support needed to give their best evidence, whether before a jury or a Judge sitting alone.

It is recognised that if the accused is a DFV victim survivor, Aboriginal or a Torres Strait Islander person, they can face particular disadvantage.

In LAQ's experience, it is very rare for an accused to make an application to be declared a "special witness" at their trial. One matter in which LAQ represented a defendant who was declared a "special witness", involved two attempts at trial for the murder of their partner. Both trials involved the defendant struggle to give evidence in their defence due to a number of personal challenges, even with special conditions having been put in place that were derived from a variety of psychiatric evidence and reports. The matter ultimately proceeded to sentence after a plea of guilty to manslaughter was accepted by the prosecution.[56]

If necessary, the provisions of s21A of the *Evidence Act 1977*, could be extended to include DFV survivor victims in the category of accused persons and to expressly include Aboriginal and/or Torres Strait Islander people, for example, in a similar manner to which the questioning of Aboriginal and/or Torres Strait Islander people is referred to in s 420 *Police Powers and Responsibilities Act 2000* (Qld). It is noted that there have been amendments to the *Evidence Act 1977* which are yet to be proclaimed with respect to special witnesses. Where a criminal proceeding relates wholly or in part to a sexual offence or a domestic violence offence, the amendments introduce a presumption with respect to a special witness, such that a court must make one or more appropriate orders for alternative arrangements for their evidence.[57] It is noted that the amendments do not change the definition that a special witness can be a person charged with an offence.

If the definition of special witness were extended to expressly include these two categories, consideration should also be given to extending the presumption to these categories.

With respect to the category of DFV victim survivor, it is contemplated that their claim to be "the person most in need of protection", would be disputed by the prosecution. If there were a presumption in place, this would remove the requirement to adduce evidence to justify that they qualify as a special witness and are entitled to these measures. This would remove the risk of disclosing an aspect of the defence case, in order to support an application. The latter may not be in the accused's best interests and would be a matter for tactical decision-making during trial preparations.

If a declaration were made, the measures which might be available to a special witness who is an accused giving evidence, would also be limited in nature, either as a result of 'tactical' decisions or the circumstances of the individual case. For example, it may not be in the best interests of an accused to give evidence from a remote room for example, despite directions to the jury, as this could detract from the directness and impact of their testimony. The most useful measures in a practical sense, would possibly be the provision of a support person when giving

[56] *R v Gwenda Lee Brown* (Supreme Court of Queensland, Crow J, 31 August 2023).
[57] *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) s 2(c).

evidence and the exclusion of non-essential people from the court room. In the case of the latter though, if it is the deceased's or complainant's family that are observing proceedings, it is highly unlikely that a trial Judge would exclude them from the courtroom on the basis of such an application.

An amendment to this provision to include this category of accused could lead to more pre-trial hearings. It could also be under-utilised due to the risks of revealing aspects of a defence prior to trial by bringing the application or due to the efficacy of the measures which would be available.

There is no express recognition of Aboriginal and/or Torres Strait Islander persons in the provisions. LAQ recommends consultation with First Nations peoples in order to further consider expanding the definition to include this cohort.

Require pre-charge consideration of victimisation and abuse history of the defendant

LAQ supports a policing approach which requires pre-charge consideration of victimisation and abuse history. This could lead to better outcomes for this cohort of accused, who in LAQ's experience are often misidentified as the primary aggressor.

> ***Case study:***
>
> One of LAQ's practitioners reported a case of an accused who acted defensively by throwing a glass at a wall, which then bounced off and cut the primary aggressor. Police were called and she was charged with assault occasioning bodily harm. She instructed her lawyer that she had been trying to dry her young son's school clothes in the loungeroom and had made a noise which angered the partner, and she was trying to scare him off. She also had a 6-week-old baby and had not been sleeping. Her history of lengthy abuse was given to her lawyer, but she had not reported this to police. The complainant then later choked her. Police charged him with attempted murder, and he was taken into custody.
>
> The client attended court weeks later with her baby and saw the duty lawyer who was then able to assist her with her legal matter, seek an adjournment and send a submission to discontinue the matter in the public interest. Ultimately the complainant indicated an unwillingness to co-operate, and the assault occasioning bodily harm charge was discontinued. A different approach from the outset in this matter could have resulted in a better understanding of this vulnerable woman's trauma response, a quicker resolution for her and less impact on court resources.

Documentation regarding pre-charge considerations could also support defences which are later relied upon by a DFV victim-survivor by providing proper context to complex offending dynamics. Early capture of important evidence can support the credibility of an accused, if they elect to later give evidence at trial and rebut any assertions of recent invention. Records can be provided as collateral material to experts who may give evidence in support of a defence. Records of relevant history can also give weight to negotiations and lead to earlier resolution of charges. Documentation can also support submissions in mitigation pursuant to section 10B of the *Penalties and Sentences Act 1992* if the matter proceeds to sentence.

The proposal to amend the Operational Procedures Manual to include more tailored and specific guidance at an early stage, is supported. LAQ submits that targeted and ongoing training is required in conjunction with any amendments, to embed and implement cultural change.

Improve access to bail for DFV victim-survivors

In LAQ's experience, it is unusual for an accused to be granted bail pending a murder trial, given the onerous nature of the provisions. The *Bail Act 1980* prevents a Magistrates Court granting bail for murder, limits the jurisdiction to the Supreme Court and by virtue of section 16(3) requires the defendant to show cause why their detention is not justified. Bail is only granted in exceptional circumstances. Despite these hurdles, if a DFV victim survivor is charged with homicide, and prospects of conviction do not appear inevitable, there would generally be merit in making a Supreme Court bail application. Arguments could be made that cause is shown, on the basis of the deficiencies in the evidence, and that detention in custody is not justified as they do not present an unacceptable risk in terms of the provisions.[58] If the accused's time in detention outweighs their expected sentence if convicted, (not relevant in a murder case, but relevant for a manslaughter conviction) this is highly relevant as well. In some cases, psychiatric evidence is required to support that a defendant is not at risk of self-harm or should remain in custody for their own protection, in order to satisfy this aspect of the provision.

If the "show cause" provisions in the Bail Act were amended to exclude their application for a defendant who was the person "most in need of protection", it is anticipated this would be in issue between the parties. It is unlikely that police would decide, or prosecuting authorities would concede that the defendant was the party "most in need of protection". If the Court were required to consider the provisions of section 22A of the *Domestic and Family Violence Protection Act 2012,* submissions would be directed to assisting the court to determine which person in a relevant relationship is the person most in need of protection. This would result in lengthier and more complex bail applications, and further burden on the resources of busy courts.

The strength of the Crown case is a significant factor in applications for bail for defendants charged with murder. Given the serious nature of the charge, it is difficult to envisage a drafting of this type of proposal without significant unintended consequences. Maintaining as many defence options as possible (partial and complete) is therefore important to ensure this category of defendants receive a fair hearing and that criminal responsibility and moral culpability are appropriately and fairly measured. The relevance of those defences could also play a role in bail applications in terms of assessments of time spent in custody against the strength of the Crown case in murder versus manslaughter convictions.

In LAQ's experience, it can be difficult to access clients on remand and can contribute to delays in bail applications, as well as other court processes, due to the demand on correctional centres for legal visits. Lack of access experienced by LAQ's practitioners include:

- delays in being able to obtain client instructions: while for most correctional centres there are mechanisms in place for documents and instructions to be sent by electronic means, which can be more swiftly executed, there are some centres who do not facilitate that. This necessitates documents, including instructions and Legal Aid applications, to be posted to a prisoner with a return envelope included, or for a prisoner to be produced at court for the purposes of taking signed instructions. This can result in matters being delisted, more time in custody for a prisoner who might otherwise have been released, and, following a conviction, cause delays in obtaining signed notices of appeal (resulting in more prisoners making applications to appeal out of time).
- Lack of physical access to clients: In the experience of LAQ lawyers, many prisoners may be illiterate and innumerate, have intellectual disabilities, mental health conditions,

[58] *Bail Act 1980* (Qld) s 16(3).

neurodevelopmental disorders, substance use disorders, impairments in their memory and adaptive functioning, or a combination of the above. Those clients are better served by being able to review documents in the company of their lawyers. Where a defendant is produced at court to facilitate such things, LAQ is aware that some prisoners can spend up to a week in a watch house. Prisoners can find extended time in a watch house distressing due to the limited facilities, freedoms, and conditions of that environment.

- Inflexibility in in-person visiting hours and videoconferencing availability: for some clients on remand, LAQ practitioners wait weeks for a videoconference to be available due to both the high numbers of clients on remand, and a lack of facilities within the centres. It can be difficult to make bookings for medical professionals at some centres due to an inability to extend visiting hours, resulting in an assessment being divided sometimes over the course of multiple days.

LAQ supports investment into online resources and technology in Correctional Centre environments, to enhance client access to advice and information, and to assist legal practitioners in preparing their cases.

Introduce specialist prosecutors and defence lawyers for women who kill

It is considered that legal practitioners with a wealth of experience, who practice in the criminal law jurisdiction are well-versed in their ethical duties to act in the best interests of accused, and to present their case as the model litigant. This includes a duty to maintain a current knowledge of the law as well as contemporary issues impacting their practice. This includes a duty to understand the complexities of DFV victim survivor experiences, including social entrapment and other relevant frameworks.

Specialist accreditation for practitioners who represent women who kill in this context, is unnecessary and may be under-utilised. These cases are relatively rare. LAQ supports the availability of regular legal professional training through professional organisations such as the Queensland Law Society and Bar Association of Queensland to ensure that research and knowledge in this sector is current and that skills are responsive to the issues. This should include communication skills aimed at applying a trauma-informed approach to the taking of instructions from vulnerable clients and workshops to promote knowledge sharing to develop broader skills.

Question 17: What reforms are needed to criminal law practice and procedure to facilitate:

a) Early identification of self-defence in criminal investigations and prosecutions
b) Early resolution of criminal prosecutions?

ODPP take carriage of homicide cases pre-committal and introduce measures to facilitate early pleas of guilty

LAQ supports the early engagement of the ODPP, for reasons which are directed at improving efficiencies in the conduct of homicide committal hearings and to promote earlier resolution of these matters post-committal and pre-indictment presentation. LAQ does not support mandatory measures due to the limited utility of case conferencing in a homicide case, at a pre-committal stage.

Experienced criminal law practitioners in LAQ's in-house Criminal Law Services Division report greater efficiencies in the conduct of a homicide committal hearing, including a better level of responsiveness and ability to progress issues such as disclosure, when the ODPP have carriage of the prosecution of homicide offences from the outset.

The capacity and resources of the ODPP to enter into negotiations at an early stage is also of benefit. LAQ notes however that these negotiations usually have better success after the matter has been committed for trial. It is unusual for a homicide to resolve at the pre-committal stage, before the evidence has been properly tested and the extent of the prosecution case is properly appreciated.

The fact that a murder conviction carries a mandatory life sentence, means that most matters are contested at a committal hearing. If scope exists for a submission, with respect to manslaughter or accessory after the fact to murder (for example), then this is most often made by way of submission to the Court at the conclusion of the hearing, or post-committal to the ODPP. Submissions of this nature are rarely accepted by the ODPP pre-committal. If they are, this is often in response to an undertaking of an accused to co-operate pursuant to section 13A of the *Penalties and Sentences Act 1992*, usually in cases of co-accused defendants.

The benefits of having the ODPP as the prosecuting agency from commencement of the case are that a greater level of disclosure takes place pre committal, and negotiations can commence earlier in proceedings. The ODPP has six months to present an indictment in the Supreme Court, so the benefits of expedient negotiations are well recognised by LAQ practitioners to limit delay for these clients who are usually on remand. In LAQ's experience, these negotiations are often met with more success, in part because the ODPP has been directly engaged with the issues in contest by virtue of exposure to the evidence at the committal hearing.

Mandatory case conferencing at a pre-committal stage for homicide matters is unlikely to identify matters which could resolve as a plea. Relevant partial defences or lack of intention to kill or do grievous bodily harm, are regarded as matters for a jury 's consideration. An accused may deny causing the death. Issues of causation are often explored at a committal hearing in order to found a submission.

It is fundamentally unfair to expect an accused to enter into negotiations before the extent of the prosecution case against them is known. It is LAQ's position that it cannot always be known by digesting a brief of evidence. Experienced practitioners do not regard a brief of evidence as a foolproof representation of a prosecution case, for good reason. Witnesses are prone to change their versions when giving oral evidence, sometimes unexpectedly. In LAQ's experience, it is not uncommon for prosecution witnesses to give evidence at a committal which differs from that in their police statement or to make reasonable concessions when their evidence is tested. This is where the value in a committal hearing lies, and it can significantly change a case against an accused.

Requiring the defence to give notice of reliance on particular defences

LAQ does not support any amendment making it a legislative requirement that an accused give notice of a relevant defence.

LAQ notes the observation in the consultation paper[59] that to require "*pre-trial disclosure of matters including the nature of the defendant's defence and the particular defences relied upon*" has drawn criticism, as an *"inappropriate limit on the defendant's rights in criminal proceedings, including the right to silence*". LAQ's position is that requiring mandatory disclosure of a defence

[59] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [344].

is an erosion of an accused's fundamental right to a fair trial. An accused has the right to know the prosecution case they are required to meet. This cannot be truly known until the prosecution case at trial has closed.

In cases of self-represented accused, this requirement would create even further disadvantage and unfairness.

LAQ's experience in negotiating with prosecuting authorities, is that mandatory pre-trial disclosure of an accused's intention to raise a defence (particularly a complete defence) would do little to result in the earlier resolution of criminal proceedings.

It is LAQ's experience that very few prosecutions are discontinued (either at the Magistrates Court, but almost never at the District/Supreme Court level) when issues of self-defence are raised with the prosecution pre-trial. In the vast majority of cases, the view of the prosecution is that it is "a matter for the jury" as to whether an accused should be acquitted on the basis of self-defence.

LAQ notes the introduction of the Practice Direction in the Supreme Court[60] to improve efficiencies, narrow issues and prevent delays in the trial process. The case conferencing requirements do not mandate a notice of reliance on a particular defence, outside of the requirements of s590AB and the Expert Evidence Practice Direction[61], if for example a mental health defence is to be relied upon at trial.

In LAQ's experience thus far, the case conferencing process and oversight by the Registrar subject to this Practice Direction, has resulted in the parties identifying issues in dispute for trial. This includes identifying pre-trial issues and applications that may be brought before a trial judge (such as a jury view) at an early stage and well before the trial listing.

Introduce pre-trial hearings to determine the availability of defences

LAQ does not support this proposition. Introducing an amendment which requires pre-trial determination of a defence, has the potential to severely restrict an accused's right to a fair trial. An accused has a right to appreciate the evidence given in the prosecution case before being required to present a defence, including being called upon to give or call evidence. This fundamental right would be eroded by introducing measures which hope to provide certainty but erode an accused's right to a fair trial, in the process.

Interlocutory appeals

LAQ does not support this amendment to section 668A of the Criminal Code. Allowing such litigation within the trial process will cause considerable delay in the resolution of matters. Delay impacts an accused who has the right to a trial without undue delay. It also unfairly impacts complainants, and the loved ones and family of any deceased. This will also cause further cost to the community as trials will be drawn out processes, placing even more burden on jurors when such applications occur during the course of a trial. The disruption to a jury's consideration of the evidence and the fairness of the process for both parties, would be of significant concern.

LAQ submits any benefit of legal clarity would be outweighed by the delays and disruption this would cause. The mechanism that currently exists operates well to determine these legal issues on appeal and allows an opportunity for a Court of Appeal to consider and deliver judgment without the pressure of a trial in progress.

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[60] Supreme Court of Queensland, Practice Direction 5 of 2024.
[61] Supreme Court of Queensland, Practice Direction 14 of 2024.

If such an amendment were to be made, it would also have cost implications for LAQ in terms of appropriate funding.

Clarify when a trial judge must leave a defence that was not expressly relied upon

LAQ supports the existing cautious approach adopted in Queensland[62] with respect to directing a jury on a defence not expressly relied on, but otherwise raised on the evidence. LAQ does not support amendments that would limit the availability of defences to be left to a tribunal of fact even where contrary to the defendant's case. Further, LAQ does not support an adoption of the New South Wales approach to require leave on a conviction appeal where defence did not object to the direction or omission at trial.

This is particularly the case where there is significant evidence to support the availability of a particular defence. The evidence as a whole may reveal a defence which a jury, as arbiter of the facts, may wish to consider. If a jury is satisfied of certain facts, they should be assisted in applying the law to those facts.

The fact that an accused has not relied upon the particular defence or that trial counsel did not seek a direction, should not be determinative. It is a matter of fairness that:

> *"Irrespective of the position taken by defence counsel, it is the duty of a trial judge to leave to the jury for its consideration, and to direct the jury accordingly, any defence that fairly arises on the evidence".*[63]

In R v MEB [2024] QCA 188 the Court dealt with the defence of provocation pursuant to section 269 of the Criminal Code, where the prosecution bears the onus of negativing the defence.

R v MEB at para [38]:

> "*Viewing the complainant's evidence and the appellant's interview in the manner most favourable to the appellant, there was "material in the evidence which might arguably be thought to give rise to a defence of provocation". On that view of the material, a jury acting reasonably might have failed to be satisfied beyond reasonable doubt that the assault was unprovoked in the relevant sense. In those circumstances, the trial judge was under a duty to leave provocation to the jury, notwithstanding that reference to the same material in the evidence may not have been sufficient to find affirmatively that provocation existed. Adopting the cautious approach commended in R v DCE [2024] QCA 165, provocation should properly have been left to the jury."*

In *Stingel v The Queen*, the High Court recognised the need for a trial judge to exercise caution before declining to leave provocation to the jury in a case:

> *"where it is sought to rely on a defence of provocation or failing to do so in a case where, even though provocation is not raised by the accused, there is material in the evidence which might arguably be thought to give rise to a defence of provocation.*[64]*"*

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[62] See *R v DCE [2024] QCA 165* and R v MEB [2024] QCA 188

[63] See *R v Lefoe* [2024] QCA 240, [80] citing *Pemble v The Queen* (1971) 124 CLR 107, 117-118, 138, 141; *Stevens v The Queen* (2005) 227 CLR 319, [68].

[64] *(1990) 171 CLR 312; [1990] HCA 61 at 33*

Amend police and prosecution policies to facilitate the charging of manslaughter where a DFV victim-survivor kills their abuser

LAQ supports an amendment to the Director's Guidelines to provide additional guidance as to when it may not be in the public interest to continue a prosecution in a case where a DFV victim survivor has killed their abuser.

There is high public interest in prosecuting a homicide. In cases where a DFV victim survivor has killed their abuser, the degree of culpability, prospect of conviction and the need to maintain public confidence in the judicial system, are all relevant factors under the ODPP Guidelines.[65]

LAQ also notes statistics that the majority of female offenders in intimate partner violence homicides, were also primary domestic violence victims and the most common outcome for them in the criminal justice system, was a manslaughter conviction.[66]

The Australian Domestic and Family Violence Death Review Network Data Report, Intimate Partner violence homicides[67], in its key data findings, notes:

- Between 1 July 2010 and 30 June 2018, there were 311 IPV homicides across Australia.
- More than three quarters of all cases involved a male IPV homicide offender killing a current or former female partner (n=240, 77.2%). The vast majority of those male offenders had been the primary user of domestic violence behaviours against the woman they killed (n=227, 94.6%).
- Less than one quarter of all cases involved a female IPV homicide offender killing a current or former male partner (n=65, 20.9%). Even though the female partner was the homicide offender, in the majority of these cases she was also the primary domestic violence victim, who killed her male abuser (n=46, 70.8%) and
- "The most common criminal justice outcome for female IPV homicide offenders was a manslaughter conviction (n=40, 62.5%). One female IPV homicide offender suicided after the homicide."

LAQ supports an amendment to the Queensland Police Service Operational Procedures manual (OPM) and Director's Guidelines, to allow the default position in cases where a DFV victim survivor kills their abuser to be charged with manslaughter and not murder, unless exceptional circumstances exist.

The trauma of enduring a trial, the length of time on remand (away from children in particular) and the risk of a mandatory life sentence if convicted, are all relevant reasons which in LAQ's experience, lead accused charged with murder, to enter into negotiations if possible. For DFV victim survivors this could lead to unjust outcomes.

In LAQ's experience, there is an understandable reluctance to exercise the right to rely on a more fitting available defence, which could reduce a murder charge to manslaughter, or result in a complete acquittal, because of the risk of mandatory life imprisonment.

The removal of the prospect of mandatory life imprisonment would permit a DFV accused to feel more confident in proceeding to trial and raising a defence which could see a complete acquittal.

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[65] See https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/14407a5c-e40f-4301-b64c-28ce0dc94ba5/director-public-prosecutions-guidelines.pdf?ETag=8fc37ec709d627ca2223d18e79794dba at pages 3 and 4.

[66] https://apo.org.au/sites/default/files/resource-files/2022-02/apo-nid316709.pdf

[67] 2010–2018 Second edition | 2022 at page 12 and 13

Case Study

LAQ acted for a DFV victim survivor who had the option to proceed to trial and raise killing in preservation in an abusive domestic relationship, (section 304B Criminal Code), or accident under section 23 of the Criminal Code. She had caused the death of her abusive partner with a single stab wound. She grabbed a knife in the kitchen as he advanced towards her, in an effort to disarm her. He had physically assaulted her just prior to this incident, and she had escaped from him to run into the kitchen. She had endured a history of abuse at his hands.

She feared the risk of a murder conviction and the fact she may not see her young child grow up. She only had very minimal records which would support her history of abuse, as she had kept her situation largely to herself. She instructed her lawyers that she did not wish to rely upon a section 304B defence at trial, or a section 23 defence. She instead instructed to negotiate the charge to manslaughter on the basis that she lacked an intention to kill or to do grievous bodily harm. This was accepted and she proceeded to sentence.

The removal of the prospect of mandatory life imprisonment would permit such an accused to feel more confident in proceeding to trial and raising a defence which could more accurately reflect the circumstances of the killing and result in a complete acquittal.

Question 18: What reforms are needed to criminal law practice and procedure to facilitate the admission of evidence about the nature and impact of DFV on victim-survivors who offend?

This response addresses the three potential reforms that are proposed in the consultation paper.[68]

Establishing a DFV expert evidence panel

LAQ does not support the introduction of an expert DFV panel to better inform juries in a general sense regarding the impacts of domestic and family violence.

Any accused in a criminal proceeding can call expert evidence in support of a defence at trial, provided there is compliance with notice under section 590AB of the Criminal Code. In a Supreme Court trial, the requirements of Practice Direction 14 of 2024 are also required to be met.[69]

The *Evidence Act 1977* specifically provides a framework for the admissibility of expert evidence of domestic violence in a criminal proceeding.[70] This can include general evidence about the nature and effects of domestic violence on persons and specific evidence about the effect on a particular person. Relevant evidence of domestic violence may relate to a defendant.[71]

If such a panel were constituted, LAQ acknowledges it has the potential to be useful for victim-survivors who are defendants. On the face of it, there is clearly value in access to experts who could support a defence and give relevant evidence specific to the case. The benefits for an accused are also the removal of the financial burden of sourcing and funding an expert report.

[68] paragraphs 364 – 371, Pages 67 – 68
[69] Expert evidence in criminal proceedings other than sentences
[70] *Evidence Act 1977* (Qld) s 103CC.
[71] *Evidence Act 1977* (Qld) s 103CB.

LAQ foresees a challenge though in sourcing suitably qualified forensic experts to constitute a panel. It is crucial to commission reports from an expert who is suitably qualified, and in this context, this is usually a forensic psychiatrist or psychologist.

The use of social scientific or social worker evidence is not widely used in LAQ's experience in a criminal law trial in Queensland. LAQ notes the decision in *Liyanage v The State of Western Australia* [2017] WASCA 112, where the appellant appealed her conviction for the manslaughter of her abusive husband, whom she had struck on the head while he slept. One ground the WA Court of Appeal was required to consider was whether the trial judge erred in ruling that the evidence of a social worker as to domestic violence risk assessment and social context of domestic violence was inadmissible.

The Court concluded that the trial judge did not err, stating with respect to the risk assessment evidence that:

> "However, notwithstanding her experience in dealing with these issues as a social worker, if evidence were to be given in court predicting the deceased's future actions and intentions then it should be given by a psychologist or psychiatrist, whose profession is directed to the scientific study of human behaviour, with appropriate qualifications and experience."[72]

The Court also examined the admissibility of relevant social context evidence and found that:

> "there is also a lack of relationship between much of the contextual evidence which the appellant identifies and the evidence of the primary facts given by the appellant. For example, general statements about the 'nature of domestic violence and the fact that it's about coercion and control' could not assist the jury in determining whether the appellant believed, on reasonable grounds, that her actions were necessary for defence."[73]

On the other hand, the Court noted that social context evidence which could be relevant in that case, could include evidence about any cultural barriers the appellant may have experienced, about which the jury may not be familiar. The Court observed,

> "An appreciation of those barriers may be relevant to an assessment of the options which the appellant would have believed to be open to her, and the reasonableness of her beliefs and response."[74]

LAQ agrees with the following observation,

> "Choosing an expert who has a sophisticated understanding of contemporary theoretical approaches to intimate partner violence, and who understands the legal framework within which their testimony will be applied, is essential".[75]

There is also recognition that expert opinion in the context of DFV victim-survivors can sometimes be problematic for an accused who wishes to rely on self-defence. LAQ notes:

> "The acknowledgement that abuse may have psychological consequences, such as memory loss and impaired reasoning, may be vital to explain some aspects of the

[72] *Liyanage v The State of Western Australia* [2017] WASCA 112 [158].
[73] *Liyanage v The State of Western Australia* [2017] WASCA 112 [167]-[168].
[74] Liyanage v The State of Western Australia [2017] WASCA 112 [164].
[75] Ibid, at 696.

evidence, or a lack of evidence, but can raise problems for the defence because it may function to undermine the reasonable basis of self-defence".[76]

If a DFV expert panel, similar to the current Sexual Violence expert evidence pilot panel were considered, its scope and application to an accused should be clearly established. Stream 1 of the Sexual Offence Expert Evidence Panel focusses on a confined issue. The expert is tasked to give an opinion about an accused's cognitive and/or mental health impairment at the time of the alleged offence and if this was a substantial cause of them not saying or doing anything to ascertain whether the other person consented to the sexual act. A DFV panel would most likely involve a broader focus with more issues to consider.

The engagement and referral process would also need to articulate confidentiality, or it may be under-utilised. An expert would need to be suitably qualified and the facts on which their opinion is based founded on admissible evidence.

LAQ holds concerns that expert evidence in the terms contemplated by Stream 2 of the Sexual Offence Expert Panel, is more problematic. This proposes to introduce counterintuitive evidence and has a more limited utility. There is concern that this type of generalised evidence is not directly related to the facts of the case and will be of limited use to a jury. The task of a jury is onerous and evidence of limited use will cause unnecessary burden.

An additional concern is the delay this may cause in the trial process. Reports take time to obtain and trial listings will need to accommodate the availability of experts. Trials will be longer due to the calling of expert evidence and the testing of that evidence by the opposing party. Rebuttal evidence could also be called, adding to length.

LAQ considers any introduction of an expert DFV panel would be better informed following an evaluation of the Sexual Offence Expert Panel.

Make certain DFV jury directions mandatory

LAQ supports the maintenance of a trial Judge's discretion with respect to the timing and appropriate placement of jury directions. A trial Judge is best placed to tailor directions which suit the facts of the case and to best help a jury in its deliberations.

LAQ is concerned about the implementation of legislation designed to fetter the discretion of Judges in the conduct of a trial. Flexibility is important to avoid imbalance in the administration of a fair trial.

The discretions provided for in the provisions of Part 6A Division 3 of the *Evidence Act 1977*, including in relation to self-defence in response to domestic violence,[77] should be retained. The lack of an appropriate direction can be a matter for consideration by an appellate court. Mandatory directions may lead to further disadvantage for a victim survivor who may have otherwise successfully challenged a request by the prosecution for a direction in relation to DFV, for a complainant who is actually a primary aggressor.

Limiting admissibility of victim-blaming evidence in homicide trials

LAQ does not support an amendment to the *Evidence Act 1977* to expressly exclude evidence that meets a definition of "victim-blaming" in a homicide trial. It is unclear what legal definition this would be given.

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[76] See SE.Shehy, J.Stubbs, and J.Tolmie, 'Securing fair outcomes for battered women charged with homicide, analysing defence lawyering in R v Falls' (2014) 38(2) Melbourne University Law Review, Vol 38:666 at 700

[77] *Evidence Act 1977* (Qld) s ss 103U and s103ZA.

This amendment has the tendency to erode an accused's right to a fair trial, particularly where the consequences of conviction attract a mandatory life sentence. An accused should be entitled to elicit evidence that supports a defence, including relevant conduct of the deceased to determine the DFV history in the relationship. It is conceivable that such questioning could be argued by the prosecution to be "victim-blaming" or demeaning and outside the scope of any exception, impacting on the ability to present the full circumstances of the case to the tribunal of fact.

It is likely that this will lead to contested applications and cause further delay in legal proceedings. Criminal law proceedings in a homicide trial are lengthy. There is a prospect that legislation which invites further legal argument, will create further delay for an accused and the family and loved ones of the deceased. Lengthier and more complex litigation will also result in longer remand times for accused charged with murder who are awaiting their Supreme Court trial.

It is LAQ's experience that questioning which elicits unfavourable or prejudicial evidence in relation to a deceased in a homicide trial, is done only with specific forensic purpose and to the extent necessary to properly defend the client. It is tactically risky to do otherwise. To elicit evidence which tarnishes a deceased's reputation, without good cause, can be very counter - productive before a jury.

The alternative proposition, to amend section 21 of the *Evidence Act 1977*, is also not supported. This provision already allows for a mechanism for particular questions to be disallowed in cross-examination of a witness. This incudes offensive or humiliating questions. The court has a duty to comply with this section even if no objection is raised by the prosecution.

Question 19: What reforms are needed to criminal law practice and procedure to improve access to justice for Aboriginal peoples and Torres Strait Islander peoples?

The themes identified by the QLRC in this consultation paper, along with the same issues found in a range of reports including the Closing the Gap reports,[78] show that despite strong evidence-based research, there are still significant improvements within the criminal justice system to be made for the needs of Aboriginal peoples and Torres Strait Islander peoples to be addressed.

The targets set in 2020 by the Close the Gap national agreement included that, by 2031, adults and young people are not overrepresented in the criminal justice system.[79] Data relating to both Outcomes 10 and 11 indicate those needs continue to be unmet. Nationally, the rate of Aboriginal and/or Torres Strait Islander prisoners has increased over the last five years for adults,[80] and over the last four years for children.[81] In Queensland specifically, the rate of Aboriginal and Torres Strait Islander young people in detention on an average day has increased from 37.8 per 10,000 in the baseline 2018-19 year, to 41.1 per 10,000 in 2023-24.[82]

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[78] Commonwealth Government, *Closing the Gap, Commonwealth 2024 Annual Report, Commonwealth 2025 Implementation Plan* (Annual Report, 2025).

[79] Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Closing the Gap Target and Outcomes* (July 2020) Outcomes 10 and 11.

[80] Productivity Commission, *Closing the Gap Information Repository Dashboard: Socio-economic outcome area 10: Aboriginal and Torres Strait Island adults are not overrepresented in the criminal justice system* (12 March 2025)

[81] Productivity Commission, *Closing the Gap Information Repository Dashboard: Socio-economic outcome area 11: Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system* (12 March 2025)

[82] Productivity Commission, *Closing the Gap Information Repository Dashboard: Socio-economic outcome area 11: Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system* (12 March 2025)

Access to justice for Aboriginal peoples and Torres Strait Islander peoples is impacted by historical and contemporary failings both within and outside of the justice system in Australia.[83] In terms of those factors proximate to the criminal justice system; legislation, policies and practices, discrimination, over-policing, poverty, ignorance of cultural protocols and obligations, communal responsibilities, and rapid responses in relation to wrongful activity are just a few of the areas of difference for Aboriginal and/or Torres Strait Islander people in their quest for justice. LAQ considers that attempts to limit the availability of criminal defences further entrenches barriers to accessing justice.

LAQ is supportive of reforms that would improve cultural understanding within the criminal justice system; acknowledging that this is but one of what is necessarily a multi-faceted approach at increasing access to justice and just outcomes for Aboriginal peoples and Torres Strait Islander peoples. More broadly than the three proposals within the consultation paper, reforms that increase access to legal representatives for incarcerated defendants, bail programs, culturally appropriate post-sentence programs, and resources to ensure language barriers and those with cognitive deficits are identified and treated appropriately within the system are needed.

> ***Case study:***[84]
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> LAQ represented a First Nations man who had been convicted on his own plea of guilty, as a child, of sexual offences across multiple cases. An application was brought to have him made subject to orders pursuant to the *Dangerous Prisoner (Sexual Offenders) Act 2003* (Qld) towards the expiry of his sentence. As a result of psychiatric material produced in those proceedings, it was discovered that he had been permanently unfit for a considerable time, including at the time of the offending and when he entered his plea to the charges. He had experienced global development delays and a failure to thrive; his mother having heavily consumed alcohol throughout her pregnancy as well as suffering considerable neglect between the ages of 0 – 5. He was also exposed to significant trauma and violence in the environment in which he was raised (to name a few of the contributing factors) during his childhood. That was likely to have contributed to his mild to moderate intellectual disability. A neuropsychologist opined that he achieved a full-scale IQ in the extremely low range, falling within the 2nd percentile, with similarly low scores in verbal comprehension and perceptual reasoning. An application for leave to appeal his conviction out of time successfully remitted the matter for re-hearing, and proceedings were ultimately dismissed. Despite having served his entire sentence, he was ultimately found unfit on the original charges and placed on a forensic order. He had suffered significant injustice as a result of his multiple diagnoses not having been appropriately addressed and considered by numerous relevant stakeholders within the child protection and criminal justice system.

Evidence of traditional laws and customs

Traditional law and custom has seen an oral system of passing information from generation to generation through story telling and narratives that are aligned to place and rituals. In *Ward v Western Australia*,[85] it was noted;

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[83] See QLRC, Review of particular criminal defences - Consultation paper (Feb 2025) at [372]. See also Productivity Commission, *Closing the Gap Information Repository Dashboard: Socio-economic outcome area 11: Aboriginal and Torres Strait Islander young people are not overrepresented in the criminal justice system,* Historical and ongoing target context (12 March 2025)

[84] *R v CCJ* [2019] QCA 236.

[85] *Ward v Western Australia* (1998) 159 ALR 483.

> Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice.

LAQ is supportive of measures which would increase access to justice by Aboriginal peoples and Torres Strait Islander peoples and welcomes further in-depth examination as to the workability of such a proposed exception, including the necessity for directions to accompany the giving of such evidence. LAQ has not had the opportunity to fully review the provisions in other Australian jurisdictions and how those exceptions have been applied in practice; though LAQ notes such an exception either exists, or shortly will exist, in the majority of Australian jurisdictions.

Increasing cultural capability training

LAQ supports increased access to cultural capability training, which should be tailored to the specific local community being worked within to ensure maximum efficacy.

The QHRC report noted that communications and training are less likely to succeed in shifting culture, without change to practical systemic changes,[86] and the Judicial Commission of New South Wales *Handbook for Judicial Officers* notes:

> It is well accepted that judicial education and programs informing judicial officers about cultural awareness issues are invaluable. These programs provide knowledge of cultural differences and insight regarding barriers and disadvantages that impact on access to justice. They also open our eyes to the limits of our own life experiences, biases we may harbour, or assumptions that we all subconsciously make to some degree, even despite our best efforts.[87]

Increasing accessibility of cultural reports

LAQ supports increased resourcing for both legal service providers and community groups in remote and regional areas. As noted in the Justice Project report:

> Vinson and Rawsthorne have reinforced that experiences of complex disadvantage in Australia are not evenly distributed across the community: they are geographically concentrated, complex and persistent. In 2015, they found that three per cent of communities throughout Australia experience systemic disadvantage, characterised by significantly higher rates of unemployment, low income, family violence, prison admissions, mental health conditions, low levels of education, and young people not engaged in education or training. Most of these communities are in regional Australia, and communities with high Aboriginal and Torres Strait Islander populations.[88]

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[86] Queensland Human Rights Commission, *Strengthening the Service: Independent review of workplace equality in the Queensland Police Service* (Report, 10 December 2024), 75, citing Frank D Golom, 'Reframing the Dominant Diversity Discourse: Alternate Conversations for Creating Whole System
Change' (2018) 29(1) Metropolitan Universities 11, 22; and UN Women, What Will it Take? Promoting Cultural Change to End Sexual Harassment (September 2019) 27.

[87] Judicial Commission of New South Wales *Handbook for Judicial Officers: Cultural diversity: reflections on the role of the judge in ensuring a fair trial* (September 2022).

[88] Law Council of Australia, *The Justice Project, Introduction and Overview* (Final Report, August 2018), 52.

Anecdotally, LAQ practitioners in Queensland's most remote locations consistently utilise cultural reports from Community Justice Groups in sentencing proceedings. However they also note that there can be variability in the preparation, content, and presentation of a cultural report, inferentially arising from resourcing or funding issues for individual Community Justice Groups.

The Community Justice Group Program Evaluation Report 3 notes that in 2022-23, Criminal Justice Groups attended mainstream court on 1479 occasions, assisted 6911 people, made 991 cultural reports, and 7081 referrals.[89] That report further noted the valuable contribution of a cultural report in proceedings:

> Judicial officers surveyed and interviewed highlighted the vital outcomes of CJGs' input into court processes. For example, a majority said the information that CJGs provide courts (such a through cultural reports) significantly helps the court understand defendants' cultural circumstances, make more informed decisions. Many judicial officers recounted personal stories about how CJGs had helped develop their cultural competency and understanding of Indigenous people. This happens informally outside courtrooms as well as through formal court processes for CJG input. There is also widespread evidence of CJGs positively impacting on the cultural knowledge and sensitivity of other court stakeholders such as defence lawyers and police prosecutors.[90]

LAQ notes that Community Justice Groups operate in over 52 communities throughout Queensland and the Torres Strait and provide a multitude of practical supports to their community.[91] Many of these communities are in the most remote areas of Queensland.

Increased funding would assist in providing greater accessibility of these reports in the communities that stand most to benefit from them, as well as assist in achieving consistency in the delivery and content of the reports to maximise their relevancy for proceedings.[92]

Question 20: Are reforms needed to majority verdicts in murder and manslaughter cases?

LAQ does not support any reform to majority verdicts in cases of murder and manslaughter, and in LAQ's view consideration in doing so is premature in the current circumstances.

The approach in other Australian jurisdictions does not support extending majority verdicts in Queensland to the offence of murder. Firstly, Queensland currently has a mandatory life imprisonment whereas NSW, Victoria, the ACT and Tasmania do not.[93] Secondly, compared to South Australia, the NT and WA, which have mandatory[94] or presumptive life sentences,[95] murder is defined more widely in Queensland[96] *and* the Queensland sentencing regime is harsher.

In *Cheatle v The Queen*, the High Court stated:

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[89] Community Justice Group Program, *Phase 3 Report: Evaluation of Community Justice Groups* (November 2023), at 64.

[90] Community Justice Group Program, *Phase 3 Report: Evaluation of Community Justice Groups* (November 2023), at 91.

[91] Queensland Courts, *Community Justice Group Program* (25 September 2024).

[92] For example, by reference to the Bugmy Bar Book which is an invaluable resource for practitioners.

[93] *Crimes Act 1900* (NSW) s 19A; *Crimes Act 1958* (Vic) s 3(2); *Crimes Act 1900* (ACT) s 12; *Criminal Code 1924* (Tas) s 158.

[94] *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Code Act 1983* (NT) s 157.

[95] *Criminal Code Compilation Act 1913* (WA) s 282; *Criminal Code Act 1983* (NT) s 156; cf *Criminal Code 1899* (Qld) s 302.

[96] See for example the definitions in *Criminal Code Compilation Act 1913* (WA) ss 178 and 279,

> 'the common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given benefit of any reasonable doubt.'[97]

In all the circumstances described above, it is appropriate a person is convicted of murder in Queensland only after truly being given the benefit of any reasonable doubt through a unanimous verdict.

LAQ also does not support amending the *Jury Act* to provide that a unanimous verdict of not guilty to murder is required before the charge of manslaughter is considered. If a unanimous verdict of guilty is not reached, then the defendant has not truly been found guilty beyond all reasonable doubt. It is appropriate, in that situation, to move to consider manslaughter.

LAQ also does not support requiring the Crown's consent to either take a verdict on manslaughter after no unanimous verdict on murder can be reached or take a majority verdict to manslaughter as an alternative charge. It is likely this decision would usually be exercised by the Crown in their strategic interest. It is also difficult to envisage how a prosecutor could sufficiently quickly consider the prospects of success of a re-trial for murder for that consideration to meaningfully and actually inform whether consent is given. Both reforms would likely see more retrials for offences of murder, increasing the cost and delay in cases of murder.

Question 21: Do you support:

a) option 1: repeal section 280 of the Criminal Code or
b) option 2: limiting the application of section 280 (and if so, how) or
c) some other approach

LAQ recognises there is a multitude of legislation or policy guidelines which provide for various restrictions on the use of force against children in various settings – e.g. *Child Protection Act 1999, Youth Justice Regulation 2003*.

As noted in LAQ's policy submission response to Background Paper 1 (dated 17 January 2024), it is the experience of LAQ's defence lawyers that the defence of domestic discipline is infrequently relied upon and rarely successful.

LAQ notes that the QLRC's forthcoming research report 3 is said to analyse 571 cases where Queensland Police received a complaint of child assault and charges were not laid with reference to the 'domestic discipline' defence.[98] The police use of discretion to not proceed is referred to as a "bar to prosecution" in a range of circumstances.[99] In LAQ's view, it is essential to receive the results of the forthcoming research before meaningful comment can be made on whether there is any need for reform in the use of police or prosecutorial discretion by reference to the defence of domestic discipline. It is further noted that research report 3 will provide the outcomes from focus group studies assessing community attitudes to the defence. LAQ looks forward to reviewing the outcomes of that research.

[97] (1993) 177 CLR 541 at 553, citing *Reg v Thatcher* [1987] 1 SCR at p 698.
[98] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [402].
[99] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [406].

'Reasonable Force'

LAQ notes the concerns raised regarding both the lack of clarity for police as to what constitutes reasonable force, and the application of the objective person test by a decision maker.[100]

The level of force and potential for harm that may be unreasonable in one case, in another set of circumstances may be considered reasonable and excusable. Take for example a parent grabbing a 4-year-old child's wrist and forcibly releasing their closed fist, in circumstances where that child is simply banging their fist on the table and refusing to eat dinner. The level of force in those circumstances, is likely to be considered objectively unreasonable, even if it was accepted that it was imposed for the purpose of discipline.

However, take the example of a parent grabbing a 4-year-old child's wrist and forcibly releasing their closed fist which holds an open pair of scissors that they are using to threaten harm to their sibling. The same of level of force in these circumstances, may very well be considered reasonable and excusable.

Given that the role the common law plays in Queensland's criminal justice system is fundamental to establishing the scope of undefined terms within the Criminal Code, LAQ does not support amendments to the Code defining or limiting 'reasonable force' for section 280 at this stage. This is particularly in light of how contextual "reasonableness" is to the circumstances in which force is applied. It may be appropriate for Queensland Police Service guidelines to be developed in consultation with stakeholders, providing examples of what has been found to be reasonable or unreasonable force. Any guidelines should be based on relevant case law, e.g. *R v Terry* [1955] VLR 114, *Horan v Ferguson* [1995] 2 Qd R 490, *R v DBG* [2013] QCA 370; *ACP v Queensland Police Service* [2019] QCA 009.

LAQ notes what was said by the Court of Appeal in R v DBG at [31]:

> "…that it was for each juror to consider whether he or she was satisfied that the prosecution had proved beyond reasonable doubt that the force used was not reasonable. The jurors were to do so by reference to their own assessment of reasonableness. They were not required to make an assessment of an abstract community standard of reasonableness and then adopt it as the measure against which the reasonableness of the appellant's conduct was to be adjudged."

At this stage LAQ submits that this direction to a jury regarding reasonableness is appropriate, and there is a raft of practical difficulties with attempting to establish or apply "a community standard" in these circumstances. It is noted that the defendant's own view of the appropriateness of the discipline used is irrelevant to a consideration of whether the force used in domestic discipline was objectively reasonable – see *ACP v Queensland Police Service*.

'Management and control'

Much of the Consultation Paper's discussion regarding section 280 and proposed reform focusses on one aspect of the defence, being where the force is used for 'correction' or 'discipline', i.e. corporal punishment.[101]

The other main use of the defence is where the force is used for 'management' or 'control' of the child. It is unclear from the preliminary findings of research report 3, the breakdown of QPS

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[100] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [406]-[407].

[101] As defined at QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [397].

cases that may have been in this category, as opposed to corporal punishment. LAQ looks forward to being able to provide further comment upon receipt of the research report.

LAQ notes the QLRC view that the defence is not required in Queensland as the use of force is already protected by law.[102] Without references to legislation or case law, it is unclear what QLRC is referring to. Section 286 of the Criminal Code provides that a person who has care of a child under 16 has a duty to 'take the action that is reasonable in all the circumstances to remove the child from any such danger'. There may be some circumstances where there is overlap in a parent or teacher's positive duty to take action under section 286, and the defence provided by section 280.

If section 280 was removed from the Code however, there are likely to be a variety of possible circumstances where force by a teacher or parent is used for management or control that is considered reasonable but is not otherwise protected. Take the example outlined above where the 4-year-old has an open pair of scissors in their hand, if they were using them to stab holes in the walls of the house, but not as an immediate threat to a person, a parent forcibly removing the scissors may not be excused by the defences of self-defence or defence of another. LAQ submits this is simply one of likely many examples, which demonstrates an objectively reasonable use of force that may lead to criminal liability if section 280 is repealed.

Diversion scheme

LAQ supports the broad concept of a diversion scheme for police to divert people who may otherwise be charged with an offence involving an assault against a child. Until research report 3 is available, it is difficult to ascertain the approach being taken by police in cases such as these and whether a diversion scheme is necessary or useful. However, the experience of LAQ practitioners is that diversion schemes, when developed and administered carefully, provide a valuable alternative to criminalisation of people who otherwise would not be involved in the criminal justice system. Another advantage is increasing the cost-effectiveness and speed of resolving complaints.

If a diversion scheme was to be created, care would need to be taken in devising the scheme to ensure that there are sufficient police resources to support the scheme, and legal advice is made available to anyone being offered a diversion. Guidelines for the scheme would need to be developed in consultation with the relevant stakeholders.

Conclusions on the proposed options

Option 1 – LAQ does not support the repeal of section 280 for the reasons set out above.

Option 2 – LAQ does not support the proposed amendment of section 280 for the following reasons:

- if the defence was only available for common assault, it would be unnecessarily restrictive where the "reasonableness" test may already be a sufficient measure avoiding use of the defence where excessive force or excessive harm is present.
    - Taking again the example provided above, if the force used by the parent in grabbing the child's wrist and seizing control of the scissors resulted in a cut to the child's arm (either from fingernails or the scissors), it could be charged as either assault occasioning bodily harm or wounding. Both offences are more serious and carry higher maximum penalties, but if section 280 is limited to

[102] QLRC, *Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland* (Consultation Paper, February 2025), [420].

restrict its application from these offences the parent may be committed. It is submitted these actions are likely to be considered defensible by community standards and therefore the defendant should be able to apply the defence under section 280, despite the offence not being common assault.

- As discussed under the heading 'Reasonable Force' above, LAQ submits that it is not appropriate to amend section 280 to include deeming provisions at this stage.

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